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Interpretive Notice & Formal Opinion ("INFO") #17

Commissions and Bonuses

Overview

The Colorado Wage Act requires employers to pay employees the wages and other compensation they earn. That includes bonuses and commissions that employees earn under agreements with their employers. This INFO discusses commission and bonus agreements, including when commissions and bonuses do and don't have to be paid, such as when an employee leaves their job. This INFO does not cover the overtime exemption for certain commissioned salespeople, which INFO #1 covers.

When and How Commissions and Bonuses Must Be Paid, and Can't Be Waived

An employer must pay commissions and bonuses "earned for labor or services performed in accordance with the terms of any agreement between an employer and employee." And wages must be determinable for an employer to be required to pay them.[1] What do these concepts mean?

- ✔ **Earned:** that the employee did the work they had to do, in exchange for the promised wages.[2]
- ✔ **In Accordance With the Terms of the Agreement:** that, if the parties agreed in advance that the employer wouldn't have to pay the wages until conditions were met, those conditions were met.
- ✔ **Determinable:** that the dollar amount of the wages can be calculated.[3]

Employers and employees generally are free to decide the terms of commission or bonus agreements. But employers can't enforce invalid agreement terms, such as an agreement that employees give up their rights, under the Colorado Wage Act, to payment of wages they've earned.[4] Understanding which terms can be agreed on, and which are invalid and unenforceable, is key to understanding this area of the law.

Like other wages, commissions must be paid on a **regular schedule**. Under the Colorado Wage Act, employers have to pay wages for "regular pay periods" (lasting no more than a month or 30 days, whichever is longer), and on "regular paydays" (no later than 10 days after the end of each pay period). But employers and employees can agree on an alternative period for measuring and paying commissions (for example, quarterly).[5]

Employees paid entirely or partly by commission still must receive at least the **minimum wage** for all hours worked, except for employees exempt from the minimum wage, like "outside salespersons" (those who work mainly away from the employer's place of business, and spend at least 80% of their time on outside sales).[6] Two ways employers can and do ensure minimum wage compliance is to pay commission-based employees:

(a) base pay of at least the minimum wage, in addition to commissions; *or*

(b) a "draw" — a minimum guaranteed payment in each pay period, and if commissions due that period are lower than the draw, then the amount of the draw that exceeds those commissions will serve as an advance payment of future commissions (see below for more on "draws").

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[1] C.R.S. 8-4-101(14)(a)(I) and (II).

[2] *Nieto v. Clark's Market, Inc.*, 488 P.3d 1140, 1144 (Colo. 2021) (earned means "owed 'as return for… work done or services rendered" by an employee) (citation omitted).

[3] "Determinable" means "[a]ble to be determined or ascertained." *Black's Law Dictionary* at 544.

[4] C.R.S. 8-4-121.

[5] C.R.S. 8-4-103(1)(a).

[6] See the Colorado Overtime and Minimum Pay Standards Order ("COMPS Order"), and INFOs #1 and #1A on the COMPS Order: minimum wage requirements are in COMPS Order Rule 3; recordkeeping requirements relevant to minimum wage compliance are in Rule 7; and exemptions are in Rule 2, including for "outside salespersons" (R. 2.2.4).

Earning Commissions and Bonuses

Employers and employees generally are free to decide what employees must do to earn commissions or bonuses. That a salesperson earns a commission by making a sale is the "default" rule,[7] which means it's the rule unless the employer and employee agree to different requirements. For example, they could agree in advance that an employee has to do other work, or extra work, to earn a commission or bonus.

Scenario	Does the Employer Owe Additional Wages?
Example 1. A software company offers a $200 bonus to an employee for each new client that the employee brings in. Then the employee brings in eight new clients, but the employer doesn't pay the employee any bonuses.	**Yes,** because: ✓ **Earned:** The employee did the agreed work, bringing in new clients. ✓ **Owed in Accordance With the Terms of the Agreement:** There were no other agreed-upon contingencies for paying bonuses. ✓ **Determinable:** The amount can be calculated: $200 x 8 = $1,600. *Alliance Financial Network, Inc. d/b/a expo*, DLSS Claim #0547-19, Hearing Officer Decis. #20-059 (Aug. 2020).
Example 2. Under an employer-employee agreement, an employee must both make a sale and collect payment to earn a commission. The employee leaves the job after making one last sale, but before the customer pays, and receives no commission.	**No,** because: ✗ **Not Earned:** The employee didn't do all the work required to earn commissions. The employee did some of the work (making sales), but not all of it (collecting payments from customers). *Rocky Mountain Enterprises LLC*, DLSS Claim #5453-18, Hearing Officer Decis. #20-005 (Jan. 2020).

Calculating Commissions and Bonuses

The parties should decide in advance how the commissions or bonuses will be calculated. Sometimes, parties agree that the employer will pay a **base salary** or a **draw**. Salaries and draws provide some stability in take-home pay for people working on commissions or bonuses, but in slightly different ways.

- → If the employer offers the employee a **salary**, then the employee takes home the fixed salary amount each pay period *plus* all of the commissions due and payable under the parties' agreement (though salaries and commissions can have different pay periods and payment dates).
- → If the employer offers the employee a **draw** (sometimes called a **draw against commissions**), then the employee gets the draw amount on the agreed-upon schedule. Commissions are paid on their usual schedule, but only to the extent they exceed the already-paid draw. What if the draw exceeds the amount of commissions earned later? **Excess draws** aren't recoverable unless the employee agrees in advance that they will be (in writing, if excess draws are to be taken out of future wage payments).[8]
- → The parties may agree that an employer will advance commissions as the employee earns them, subject to **chargebacks**. If a condition of paying the commission isn't met later (for example, if a client canceled or didn't pay for an order), then the advanced commission amount may be taken out of future commission payments *if* an agreement specifies how and when the employer can deduct that money.

Because the premise of a chargeback, or recovery of an excess draw, is that a commission payment was an "advance," repaid by being taken from later wages, it must comply with the Colorado Wage Act **deductions statute**. "Deductions for loans [or] advances" must not take pay below minimum wage, and there must be "a written agreement between such employer and employee" specifying how and when repayment is to be made.[9]

[7] *See* Weick v. Rickenbaugh Cadillac Co., 303 P.2d 686, 687 (Colo. 1956).

[8] *See* Farr Ins., Inc. v. Rogers, 510 P.2d 470, 472 (Colo. App. 1973) (citation omitted) ("there was no express or implied agreement between the parties, or a promise by defendant, to pay to plaintiff the excess paid to defendant from funds other than from commissions earned. In the absence of such agreement, the defendant is not personally liable to repay to plaintiff any money paid to him over commissions earned"); *see also* footnote 9 below.

[9] C.R.S. 8-4-105(1)(b); *see* INFO #16, "Deductions From, and Credits Towards, Employee Pay," and on the specificity needed for "a written agreement" allowing a chargeback or repayment of a loan or advance, see Example C in INFO #16.

Scenario	Does the Employer Owe Additional Wages?
Example 3. The employer promises the employee a "generous" year-end bonus. There's no discussion about what dollar amount either party has in mind. The employer doesn't pay a year-end bonus.	**No,** because: ✗ **Not Determinable:** The dollar amount of the bonus, or a formula for how it would be calculated, wasn't specified. Estes Park Vacation Rentals d/b/a Sky Run Estes, DLSS Claim #0391-18, Hearing Officer Decis. #19-001 (Jan. 2019). *See also* Elevate Flooring Design, LLC, DLSS Claim #4831-18, Hearing Officer Decis. #19-067 (Sept. 2019) (employee was offered a commission "to be determined," but no agreement was reached on the commission amount).
Example 4. A newspaper pays commissions on sales right away, but defines "commissionable sales" as ones customers don't cancel within 28 days. If an order is canceled within 28 days, the related commission amount is taken out of the next commission payment, per a written agreement.	**No,** because: ✗ **Not Owed in Accordance With the Terms of the Agreement:** The duty to pay commissions was conditioned on an order not being canceled within 28 days. If an order was canceled, no commission was owed in the first place, so it can be recovered by chargeback. *Steinhebel v. Los Angeles Times Communications, Inc.*, 126 Cal. App. 4th 696 (Cal. App. 2005).
Example 5. An employer provides roofing services. It offers an employee commissions of 50% of the projected revenue from each project sold, where projected revenue = 80% of the job's sale price. It later doesn't pay the employee a commission for a job, citing large project costs resulting in zero actual revenue for the company.	**Yes,** because: ✓ **Earned:** The employee did the required work: selling roofing jobs. ✓ **Owed in Accordance With the Terms of the Agreement:** There were no agreed-upon contingencies for payment of the commissions. ✓ **Determinable:** The parties agreed to a formula in advance. The employer can't avoid paying by changing the formula after the fact. *Javernick Holdings Corp. dba Atlas Roofing Company*, DLSS Claim No. 1295-19, Hearing Officer Decis. #20-023 (Apr. 2020).
Example 6. An employer agrees to pay a commissioned employee a salary of $500 per month. This month, the employee earned $2,000 in commissions. The employer gives the employee a paycheck for $2,000.	**Yes,** because: ✓ **Earned:** The employee earned a salary and commissions. ✓ **Owed in Accordance With the Terms of the Agreement:** There were no agreed-upon contingencies for payment of these wages. ✓ **Determinable:** The employer originally owed $2,500: $500 in salary plus $2,000 in commissions. It still owes $500. If the parties agreed in advance that the $500 monthly payment would be a draw, then the employer wouldn't owe more wages. A $500 draw + $1,500 in remaining commissions = $2,000. *Mile High Real Estate, LLC*, DLSS Claim #3764-18, Hearing Officer Decis. #19-054 (July 2019). For a case on an employer's offer of a base salary *and* a draw, in addition to commissions, *see* Office Outfitters and Planners, Inc., DLSS Claim #0018-17, Hearing Officer Decis. #18-053 (Aug. 2018).

Conditions on Paying, and What Happens When an Employee Leaves

Employers and employees generally can agree in advance that the employer doesn't have to pay a commission or a bonus unless certain conditions are met. But the Colorado Wage Act "nullifies any effort to circumvent its requirements by contract."[10] The employer crosses the line if a condition effectively is an employer exempting itself from its duty to pay wages it owes to an employee.

If an employee leaves the job or is fired, the employer must pay them commissions or bonuses, so long as the employee did the required work, any agreed-upon and valid conditions for payment are met, and the wages can be calculated. The last two things could happen after the employee is gone. Employers can't get around that rule by relying on invalid agreement terms, such as terms saying that they don't have to pay the wages, or that seem to define how employees earn wages, but in reality just punish employees for quitting or being fired.

What if a salesperson did the work to make a sale, but then the sale isn't finalized until after they're no longer employed? "In the absence of an agreement on whether [the employee] was entitled to receive commissions on post-termination sales, the general rule is that 'an agent is entitled to a commission when [their] efforts were the procuring cause of sale.'"[11]

Scenario	Does the Employer Owe Additional Wages?
Example 7. An employer tells a call center employee it pays $10 for each "save": when a customer calls to cancel service, but is persuaded not to, and doesn't then cancel within 30 days. The employer then doesn't pay the $10 when an employee convinced a customer not to cancel, yet the customer canceled later, within 30 days.	**No,** because: **✗ Not Owed in Accordance With the Terms of the Agreement:** The parties had a valid agreement that the employer didn't have to pay if a call was followed within 30 days by the customer canceling service. *Skybeam LLC d/b/a Rise Broadband*, DLSS Claim #5007-18, Hearing Officer Decis. #19-056 (July 2019).
Example 8. An employer provides counseling services. It offers to pay a therapist 50% of all fees it receives from clients and their insurers. It does pay that amount. But it doesn't pay therapists when it collects no fees for their sessions; and it pays only 50% of what it actually received, even though it might have been able to bill insurers at a higher rate than it did.	**No,** because: **✗ Not Owed in Accordance With the Terms of the Agreement:** The employer's obligation to pay commissions was conditioned on the employer collecting money from clients/insurers. Commissions for sessions that weren't paid for by clients/insurers weren't payable. **✗ Not Determinable:** The amount paid was consistent with the agreement. The parties didn't agree that the commissions would account for the maximum fees the employer might have been able to collect from insurers, if it had tried to bill more. *Mo' Smiles LLC dba Thriveworks Counseling*, DLSS Claim #1987-19, Hearing Officer Decis. #20-035 (May 2020).

[10] *Nieto*, 488 P.3d at 1144 (citing C.R.S. 8-4-121).

[11] *Restatement of Employment Law*, 3.01 (comment d) (Am. Law. Inst. 2015) (citations omitted).

Scenario	Does the Employer Owe Additional Wages?
Example 9. The employer offers employees a 10% commission on sales of advertisements published in magazines the employer publishes. The agreement doesn't say anything about what happens if clients cancel or don't pay for orders. Later, the employer doesn't pay the employee when clients cancel or don't pay for orders.	**Yes,** because: ✔ **Earned:** The employee made the sales, which was all they had to do in exchange for the commissions. ✔ **Owed in Accordance With the Terms of the Agreement:** The parties didn't agree in advance that commissions won't be paid if clients cancel or don't pay for orders. ✔ **Determinable:** The amount can be calculated: 10% of sales made. *Evergreen Custom Media*, DLSS Claim #3942-18, Hearing Officer Decis. #19-050 (June 2019).
Example 10. The parties agree that the employee will get a 5% commission for each job they sell, to be paid within a week of the customer paying for it. After the employee quits, some clients pay for jobs the employee sold earlier. The employer doesn't pay commissions for those jobs.	**Yes,** because: ✔ **Earned:** The employee did what was required to earn commissions: make sales. ✔ **Owed in Accordance With the Terms of the Agreement:** Commissions weren't payable until after customers paid. That condition was met, even if it was after the employee left. Then the employer had a week to pay the employee. ✔ **Determinable:** The amount can be calculated: 5% of sales made. *Peak Building Solutions, Inc.*, DLSS Claim #5649-16, Hearing Officer Decis. #18-013 (Mar. 2018). *See also Weick v. Rickenbaugh Cadillac Co.,* 303 P.2d 686, 687 (Colo. 1956) (citing "distinction between the time when a commission is earned and the time when it may become due and payable").
Example 11. An employer policy says an employee "must be an active Team Member at the time of payout" to receive bonuses. It fires an employee the day before it pays out bonuses, and it doesn't pay them the bonus the employer confirmed they otherwise would have received.	**Yes,** because: ✔ **Earned:** The company agreed that the employee would have received bonuses, except for the fact that they were no longer employed when the company paid bonuses. Its policy didn't speak to the work the employee had to do to earn bonuses in the first place. ✔ **Owed in Accordance With the Terms of the Agreement:** The policy didn't really define valid conditions for paying bonuses. It just said the employer wouldn't pay already-earned bonuses to employees who had a right to them. The law doesn't "allow employers to manipulate … contractual language to avoid paying rightful wages to employees by conveniently terminating them shortly before their payday." ✔ **Determinable:** There was no dispute as to the bonus amounts. *Hallmon v. Advance Auto Parts*, 921 F. Supp. 2d 1110 (D. Colo. 2013).

Discretionary Bonuses

An employer doesn't have to pay a "discretionary" bonus[12] — one that the parties didn't agree in advance to pay, or to the amount. A bonus isn't discretionary if the fact that it would be paid, and how much, was set in advance.[13] *United States Beef Corporation d/b/a Arby's*, DLSS Claim #4214-18, Hearing Officer Decis. #19-060 (July 2019) ("from the outset, it was clear that the employer could decide to award no bonus at all," so it was discretionary, and the employer did not owe the employee the claimed bonus).

For Additional Information

Visit the Division's website, call 303-318-8441, or email cdle_labor_standards@state.co.us.

[12] Wages include bonuses earned "in accordance with the terms of any agreement." C.R.S. 8-4-101(14)(a)(II).

[13] See 29 U.S.C. 207(e)(3); 29 C.F.R. 779.211.